STUDY PROJECT

NEW LAWS AND INSIGHTS ENCIRCLE THE POSSE COMITATUS ACT

BY

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In 1981, Congress passed an act entitled, "Military Cooperation with Civilian Law Enforcement Officials." Through this new law (10 U.S.C.A. §§ 371-378), Congress attempted to clarify and modify the Posse Comitatus Act (10 U.S.C. § 1385). It clarified the law in the areas of providing criminal information; providing military equipment and facilities; providing military personnel to train civilian law enforcement personnel; and providing expert military advisors. Congress modified the Posse Comitatus Act so that military personnel may operate military equipment in assisting civilian law enforcement

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USAWC MILITARY STUDIES PROGRAM

NEW LAWS AND INSIGHTS ENCIRCLE THE POSSE COMITATUS ACT

INDIVIDUAL STUDY PROJECT

by

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26 May 1983

ABSTRACT

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In 1981, Congress passed an act entitled, "Military Cooperation with Civilian Law Enforcement Officials." Through this new law (10 U.S.C.A. §§ 371-378), Congress attempted to clarify and modify the Posse Comitatus Act (10 U.S.C. § 1385). It clarified the law in the areas of providing criminal information; providing military equipment and facilities; providing military personnel to train civilian law enforcement personnel; and providing expert military advisors. Congress modified the Posse Comitatus Act so that military personnel may operate military equipment in assisting civilian law enforcement personnel. This assistance is quite limited. Under implementing DOD guidance the Navy and Marine Corps may exercise aggressive assistance to civilian law enforcement officials. Certain issues, such as the military undercover agent and the joint military-civilian patrol, were not affected by the 1981 legislation. They remain sensitive areas in the day to day interface between military and civilian police. Reimbursement to DOD for services provided remains a key issue in implementing the 1981 act.

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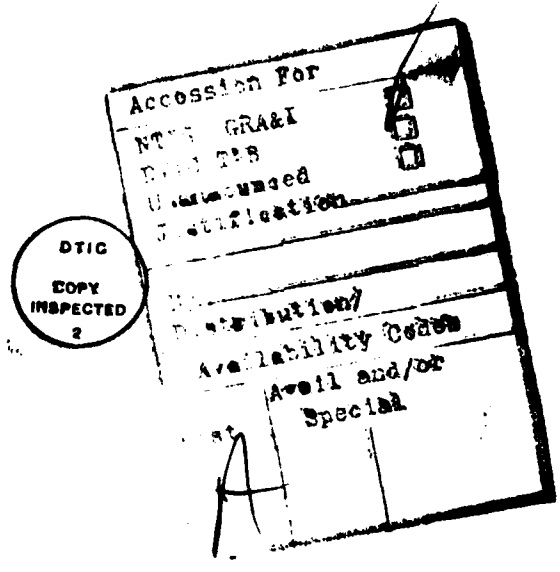

CHAPTER I

INTRODUCTION

Dear Congressman:

I'm sure somebody has already thought of this, but it sounds so good to me that I think it should be mentioned again. I'm talking about how to keep the Mexicans from sneaking into the United States.

Why don't we use the Army? They aren't doing anything else and it would be good practice for them. All we need to do is put them along the border. They already have the necessary equipment.

We could also use the Navy to help fight the dope smugglers I keep hearing about. If we sank a couple of their boats, it might make them think twice!

Your faithful constituent,[1]

The views expressed in the above letter recently were supported in part in a congressional hearing. A Florida Congressman addressed the concept of using military support to counter drug smuggling. He stated that in peacetime boredom and lack of mission have been historical problems for the military and involvement in the drug war would be extremely beneficial.[2]

These statements reflect the frustration, misunderstanding and confusion about the role of the Armed Forces of the United States in this society. This fact is not difficult to understand, because the historical relationship between the military and those in authority has never been well understood by a vast majority of the people. When that lack of understanding is coupled with serious current problems, such as unrestrained drug traffic and an illegal immigration flood, then a loud cry should be expected.

The burden of answering the faithful constituent most likely will be given to the Army.[3] The response will cite the Posse Comitatus Act[4] and explain how the Act prohibits the Army from enforcing the law:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than 10 years or both.[5]

After the constituent receives the response he will be wiser, but no less frustrated. Congress recently reexamined the Posse Comitatus Act and the issue of military support to civilian law enforcement officials. Their subsequent legislative action does not go far enough to alleviate the frustrations of the faithful constituent. Congress enacted Section 905 to Public Law 97-86,

entitled "Military Cooperation with Civilian Law Enforcement Officials"[e] (hereinafter referred to as the "new Act"). The new Act clarifies and ever-so-mildly expands the authority of the military.

This seems to be an excellent time to examine the new Act authorizing military cooperation and to reexamine the Posse Comitatus Act in view of the new Act. There is a need to understand this area of the law, to determine which direction it is heading and whether the direction is beneficial.

CHAPTER II

BACKGROUND

The Posse Comitatus Act was originally enacted in 1878[7]. It is generally accepted that the catalyst for the passage of the Act was the excessive use of and resulting abuses by the Army in the southern states while enforcing the reconstruction laws.[8] The legislative history of the Posse Comitatus Act has been fully developed in previous articles.[9] Hence, it will not be restated here. This article will only address legislative history as it pertains to and illuminates specific issues.

When a Federal criminal law, such as the Posse Comitatus Act, has been around for over 100 years and there has never been a prosecution, one might ask whether the law is viable. In fact, in 1948, when a defense counsel attempted to use the Posse Comitatus Act to challenge the jurisdiction of the court over his client, the judge complimented the counsel for "turning up of this obscure and all-but-forgotten statute...."[10]

While the act was never a vision of clarity, its reputation for obscurity was probably due to the fact that, in broad terms, it had acccmplished its mission. After the passage of the Act it was understood that Federal troops were not available to supplement civilian law enforcement officials.[11] Hence, the issue seldom arose.

On occasions, the Posse Comitatus Act has been misused by members of the Army to avoid providing assistance to civilian communities. As most civilians are unfamiliar with the Act, it is easy for the Army to say that the Act prohibits the requested assistance. For example, a church in a neighboring community would like an engineer battalion from the post to enlarge and grade their parking lot. There are numerous good reasons why the Army should not be constructing a church parking lot.[12] But, in the past, post representatives have told the church officials that providing assistance would violate the Posse Comitatus Act. The post officials were saying that they would really like to help, but if they did, it would be a crime. Such misuse of the Act only contributed to the confusion surrounding it.

Notoriety for the Act came in 1974-75. During that period, in Quantico, Virginia, marines, acting as undercover agents, were instrumental as witnesses in convicting civilians of the illegal sale of firearms.[13] The possibility of using the exclusionary rule to deter Posse Comitatus Act violations was addressed.[14] Also, a 1973 incident in the Village of Wounded Knee on the Pine Ridge Indian Reservation in South Dakota caused reverberations. Individuals who had caused civil disorder at Wounded Knee were prosecuted, inter alia, for interfering with law

enforcement officers lawfully engaged in their duties. Two of the court decisions held that possible violations of the Posse Comitatus Act precluded the Federal officers from being lawfully engaged in their duties.[15] The rationale of these decisions made it clear that the misunderstanding of the Act was not limited to church parking lots.[16]

In 1981, Congress also recognized the Posse Comitatus Act to be ambiguous.[17] They believed that some commanders were denying "aid, even when such assistance would in fact be legally proper."[18] Their concern was magnified because of the drug smuggling problem and their desire to use every means available to combat it.[19] Their solution, "Military Cooperation with Civilian Law Enforcement Officials," which is codified in Title 10, United States Code, Sections 371 through 378, will be carefully evaluated in the pages to follow.

CHAPTER III

PURPOSE

Prior to the new Act[20] (10 U.S.C. 371-378), the Posse Comitatus Act was vague and ambiguous. Now, after the new Act, certain portions of the Posse Comitatus Act have been clarified; however, other portions are still confusing. The new Act has also raised issues which did not previously exist. The purpose of this article is to provide a working understanding of the new Act. While the areas clarified will be addressed, effort will also be made to identify areas still in doubt, in order to provide guidance.

There are also areas of the Posse Comitatus Act which were untouched by the new Act and need to be examined. This examination may provide some insight as to the direction the law is moving and whether the distinct lines between military and civilian authority are becoming blurred.

CHAPTER IV

CLARIFICATIONS

SECTION 371

The first three sections of the new Act were an attempt to codify existing law and practice.[21] The "Wounded Knee" cases had been so unsettling that there was a need for Congress to set the record clear.

In Section 371,[22] entitled "Use of information collected during military operations," the military is authorized to provide to Federal, State and local law enforcement officials information collected during routine military operations when the information is relevant to a violation of Federal or State law. This is a classic case of stating the obvious.[23] At Fort Riley, Kansas in 1978,[24] an Army Specialist Four and his wife were selling marijuana out of the vegetable bin in their refrigerator. The facts conclusively showed that both husband and wife were dealing. At the time the military police apprehended the soldier, they notified the FBI as to the activities of the wife. She was subsequently prosecuted by the U. S. Attorney. This situation occurred prior to the new Act, but it is difficult to believe that anyone would think that the Posse Comitatus Act would preclude the notification of the FBI.[25]

Military Police are constantly gathering information concerning drug activities on and around a military installation. During these efforts a military informant or apprehended military dealer may provide the name of a civilian as the source of the drugs. It seems clear that both before and after the new Act, military authorities were allowed to notify civilian police of the civilian source. The issue which will be examined later is the limits on how much further the military police may go.[26]

At the time of the passage of the new Act, Congress had its thoughts on the drug smuggling problem. The House Committee on the Judiciary saw no reason why military missions could not be compatible with the needs of civilian law enforcement officials. "For example, the scheduling of routine training missions can easily accommodate the need for improved intelligence information concerning drug trafficking in the Caribbean."[27] The Secretary of Defense, in promulgating regulations for Section 371, addressed the concern of Congress.[28] He advised that under guidance established by the military secretaries, training and operations could take into account civilian law enforcement needs, but only if the collection of information was an "incidental aspect of training performed for a military purpose."[29]

Clearly, the primary purpose of the mission cannot be that of aiding civilian law enforcement officials.

However, if certain military surveillance equipment has to be tested and the location of the testing is immaterial, then coordination with local officials would seem to be in order. If, however, the best location for civilian surveillance is 100 miles farther out than is necessary for the military testing, the issue is in doubt.

Section 371 would not affect the outcome in Wrynn v. United States.[30] In that case two prisoners escaped from the Suffolk County Penal Farm in Yaphawk, New York. The sheriff requested assistance from the Suffolk County Air Force Base. A helicopter and two air force pilots were provided to assist in the search of wooded areas. Late in the day the pilot attempted to land the helicopter on a highway which was believed to have been blocked off from traffic. However, the movement of a vehicle at a critical moment caused the helicopter to swerve and hit a 20-foot sapling, throwing wood in all directions. Wrynn, a 17-year old boy was hit in the leg. He sued the United States under the Federal Tort Claims Act.[31] The court concluded that the use of the helicopter and pilots to search for an escaped prisoner constituted use of the Air Force to execute the law, which violated the Posse Comitatus Act. Further, action under the Federal Torts Claim Act would not lie, because the pilots were not agents of the Government acting within the scope of their employment.[32]

An argument can be made that if it were not for the confusion created by some of the "Wounded Knee" opinions, there would have been no need for the first three sections of the new Act. For example, in United States v. Banks,[33] one of the factors the court considered in concluding that the Government could not meet its burden of proving the lawfulness of its officers, was that Nebraska National Guardsmen had flown reconnaissance flights over Wounded Knee.[34] The court without addressing the issue concluded that national guardsmen were part of the Army for purposes of the Posse Comitatus Act. The critical issue should have been whether the guardsmen were in a state militia status or whether they had been federalized.[35] If the Nebraska guardsmen were federalized (that might explain why they were in South Dakota), then the court's view on Posse Comitatus probably was correct.[36]

In a sister case, United States v. Jaramillo,[37] dealing with the same reconnaissance flight, the court again concluded that National Guard personnel were part of the Army for purposes of the act.[38] Neither Banks, nor Jaramillo, examined the legislative history of the Act. In a rather novel approach, the court in Jaramillo, then looked at the activity on the part of the Army to determine whether it had been useful to the civilian law enforcement officers. It then concluded "[b]eyond a

reasonable doubt the aerial reconnaissance was of no usefulness to the law enforcement officers."[39] As the court could not conclude the same for other Army assistance, it decided the defendants should be "acquitted." This usefulness test applies the element of success or failure to the activity of the military. If that test had been applied to the unsuccessful search for the escaped prisoner in Wrynn,[40] the result would have been different, i.e., no violation of the act. The usefulness test seems better suited for deciding whether to send letters of appreciation.

United States v. Red Feather,[41] provided a more enlightened approach to the "Wounded Knee" situation. The court carefully examined the legislative history of the act and concluded that its purpose was to eliminate the direct active use of Federal troops by civilian law enforcement officers. The court stated "the act was intended to stop army troops, whether one or many, from answering the call of any marshal...to perform direct law enforcement duties to aid in execution of the law."[42] The court's distinction between active and passive participation on the part of the military is one which pervades the new Act.

Once the court made the distinction between active and passive roles, it had little difficulty in concluding there was no Posse Comitatus violation. Only one of the

court's distinctions is troublesome. The court's analysis concluded that investigating a crime or searching for an escaped prisoner is clearly active participation; however, reconnaissance flights gathering information surrounding an ongoing crime is passive. The latter could easily be construed as investigating a crime.

Section 371 of the new Act would not affect the status of the "Wounded Knee" reconnaissance flight. Section 371 authorizes the providing of information "during the normal course of military operations." The Nebraska National Guard flight would not qualify.

Since the time of Watergate the military has had strict rules governing the acquiring, reporting, processing or storing of information on persons or organizations who are not affiliated with the Defense Department.[43] However, these rules do not preclude the reporting of law enforcement violations by civilians who are smuggling drugs. Both the Department of Defense Directive[44] and the Army Regulation[45] specifically authorize the reporting of crimes and the keeping of a record of the report.

Section 371 includes the language that "in accordance with other applicable law" information may be provided. The House Report[46] indicates that the language was included to insure the continued application of the Privacy Act.[47] One of the purposes of the Privacy Act is to safeguard individuals against certain governmental

invasions into their personal privacy. However, the exceptions to the Privacy Act are so broad that the Act will not restrict disclosure of information under Section 371. The Privacy Act permits release of information to outside agencies and activities as long as the release is consistent with the reason for which the information was gathered and the outside activity is listed in the Federal Register as a routine user of the information.[48] The Army has blanketed the law enforcement area by publishing in its Privacy regulation a routine use of general applicability.[49] This permits the release from any file which indicates criminal, civil or regulatory violation to the appropriate Federal, State, local, or even foreign agency with the responsibility to investigate. Hence, the Privacy Act is applicable, but not of significance.

SECTION 372

Of those things which are clear and certain, it seems that it has been easier to define what is not a violation of the Posse Comitatus Act, rather than what is. Thus, prior to the "Wounded Knee" cases, everyone seemed satisfied that loaning military equipment to civilian law officers did not violate the act.[50] And, only one of the "Wounded Knee" cases raised a cloud over furnishing military equipment. In United States v. Banks,[51] the

Court concluded that the Government could not establish its law enforcement officers were lawfully engaged in their activities, a necessary element. The Court highlighted that "large amounts of military equipment, including ammunition, weapons, flares, armored personnel carriers and clothing, were loaned or sold to the"[52] Justice Department by the Defense Department "in connection with the Wounded Knee operations."[53] The court gave the sale and loaning of equipment some weight, but because of its conglomerate approach (stacking all rationale on the same pile), it is difficult to assess its value. The court concluded that based upon all factors, "there is insufficient evidence of the lawfulness of the government activity at Wounded Knee...."[54]

Unexpected decisions cause ripples in the steady flow of jurisprudence and so the notariety of the Banks case should not be surprising. It also caused hesitancy on the part of the Defense Department in supporting local emergencies.[55] This resulted in the Office of the Legal Counsel of the Department of Justice specifically addressing the issue. The opinion concluded by stating:

> It is therefore evident that the Congress, the courts, and the Department of Defense itself have recognized that the Posse Comitatus Act is no bar to the loan of supplies or equipment from the military services to local law enforcement agencies in situations where personnel of the armed forces would not be used to enforce the law.[56]

Section 372 of Title 10, United States Code[57] tracks well with what the Justice and Defense Department believed to be the existing law. While the law may not have changed, the enactment by Congress has given publicity to the fact. This has already caused an increase in requests for the use of military property.

Congress, in Section 376 of the new Act,[58] provided justification for the military services not to provide the requested equipment or facility. It states that assistance may not be provided if the assistance will adversely affect military preparedness. Section 376 is significant in evaluating what assistance may be provided under Sections 371 through 374. The new Act directs the Secretary of Defense to issue necessary regulations to insure no adverse affect on military preparedness. However Department of Defense (DOD) Directive 5525.5 adds very little to the formula.[59] It directs the heads of the Department of Defense components to insure that the decision authority is kept at a level where the decision can properly be assessed. The Directive also instructs the Joint Chiefs of Staff to assist in developing guidance for use in evaluating the impact.

It seems that it will not be the individual request which will affect military preparedness but the cumulative effect of the requests coming from different areas of the country. Thus, the approval authority must be kept at a

high level to properly evaluate. The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) must approve requests for "arms, ammunition, tank-automotive equipment, vessels and aircraft...."[60] Requests for loan of equipment for more than 60 days must be approved by the head of the DOD component.[61] While the Army has not yet published its implementing guidance, it has established a quarterly consolidated report[62] so it may assess impact and costs of the assistance.

SECTION 373

> Training and advising civilian law enforcement officials. The Secretary of Defense may assign members of the Army, Navy, Air Force and Marine Corps to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment made available under Section 372 of this title and to provide expert advice relevant to the purposes of this chapter.[63]

The legislative history of Section 373 states an intention to clarify existing practice,[64] but a careful reading indicates that the authorization is quite limited. For example, the only training authorized under the new Act pertains to the operation and maintenance of equipment provided under Section 372. This would exclude, inter alia, all training on methods and techniques of handling police duties, such as crowd and riot control. It is not unusual for Federal law enforcement officers to attend the Military Police School at Fort McClellen, Alabama. While there

will always be those who complain about this type of linkage[65] between the civilian and military, it is difficult to conceive that such training would be interpreted as "execution of the law" so as to constitute a violation of the Posse Comitatus Act.

The limited nature of the training authorization in Section 373 should not be of great concern. Congress made clear its intent not to limit the authority of the Government in Section 378.

> Nonpreemption of other law. Nothing in this chapter shall be construed to limit the authority of the executive branch in the use of military personnel or equipment for civilian law enforcement purposes beyond that provided by law prior to the enactment of this chapter.[66]

Hence, training which was lawfully provided prior to the new Act, but is not addressed in the new Act's authorization of training would still be lawful. The problem arises when the DOD Directive implementing the new Act only permits training as set out in Section 373[67]. While the authority to train beyond the scope of the new Act still exists, it is becoming more difficult to find.[68]

One of the key considerations in determining the legality of providing training should be its location. If the military police are providing training on riot control in a city caught in the middle of an upheaval, it will most likely result in a Posse Comitatus Act violation. However,

the providing of training on a military post in a classroom would not seem to violate the Act. The Government may decide as a matter of policy not to permit civilian law enforcement officials to attend military police classes, but that is something different from the activity being a crime. It seems that Congress was attempting to assert such a policy when the Committee on the Judiciary stated in its report that "/t/his section would not authorize use of a Green Beret training course for urban SWAT teams."[88] As the section is very restrictive in what it authorizes, the Committee's statement is correct. The real issue is whether after examining Section 378 and what constituted lawful activities prior to the new Act, the use of the Green Beret training course would be permissible. It is submitted that this was not the type of activity intended to be prohibited by the Posse Comitatus Act.

The new Act is specific in clarifying the authority to provide expert advice. In the "Wounded Knee" cases decided prior to the new Act, the advice provided by then Colonel Voley Warner was a key factor in those cases decided against the Government. While Warner was there as a military observer to appraise the situation, he did advise the FBI and U.S. marshals. He suggested rules of engagement, such as avoiding gun fire, and shooting to wound rather than to kill. Further, he urged Federal officials to negotiate, and supported their request for the use of unarmed armored

personnel carriers. Both Banks and Jaramillo[70] decided that the activity of Colonel Warner went too far; however, neither court concluded that he was in charge or in a position of authority over civilians.[71]

In United States v. Red Feather,[72] the court carefully examined the legislative history of the Act and decided that Congress intended to prohibit the direct active use of any military troop unit of any size. The advice of Colonel Warner was not the type of direct active participation to be constrained. In United States v. McArthur,[73] the court stated,

> 'execute' implies an authoritarian act. I conclude that the feared use which is prohibited by the posse comitatus statute is that which is regulatory, proscriptive or compulsory in nature and causes the citizens to be presently or prospectively subjected to regulations, proscriptions or compulsions imposed by military authority.[74]

The court had no difficulty in deciding that the actions of Colonel Warner were proper. It went on to observe that if law enforcement authorities may borrow military equipment, then they ought to be able to borrow expert advise.[75]

It is interesting to observe that the active/passive distinction articulated in the Red Feather and McArthur cases is alive and well in the new Act. Red Feather stated the Posse Comitatus Act prohibits direct law enforcement, such as arrest, seizure of evidence, search of a person,

investigation of a crime, interviewing a witness, and pursuit of an escaped civilian witness. This concept is expressed in Section 375 of the new Act.[76]

The new Act appears to have resolved the issue of the military providing expert advise. While the activity was probably always lawful, it is now specifically authorized. The only factual issue to be resolved in the future is whether the military advisor asserts such authority so as to place himself in charge.

CHAPTER V

THE MODIFICATION

ASSISTANCE BY DOD PERSONNEL

As stated earlier, Sections 371, 372 and 373 of the new Act were intended as a clarification of existing law. Section 374[77] of the new Act is a definite change in the law. It modifies the Posse Comitatus Act, but only slightly. Section 374 permits the use of military personnel under limited circumstances.

The military personnel may only be assigned to operate and maintain or assist in operating and maintaining equipment which was provided under Section 372 of the new Act. Only the heads of the agencies responsible for enforcing Federal drug law, immigration law and customs law may request the military personnel. Then, except in cases of "emergency circumstances," the military operators and those assisting in operating may only use the equipment for "monitoring and communicating the movement of air and sea traffic."[78] While not mentioned in the statute, both the legislative history[79] and the DOD Directive[80] state that the providing of military personnel should "be limited to situations where the training of civilian personnel would be unfeasible or impractical from a cost or time perspective."

An example of the type of assistance which may be provided under Section 374 would be pilots and radar specialists for the Navy E2-C aircraft which has the capability to detect low flying aircraft. It would be impractical from a time and cost perspective to train civilian law enforcement officers how to fly the aircraft and operate the sophisticated intelligence equipment. This aircraft is ideal for monitoring air traffic.

MAINTENANCE SUBJECT TO POSSE COMITATUS ACT

While it is probably as difficult to maintain the aircraft and its technical equipment as it is to operate it, it is doubtful that maintenance of equipment by military personnel ever violated the Posse Comitatus Act. If that is true, and this article will provide support for that position, then it is unfortunate that Section 374 included a provision authorizing personnel to maintain equipment.

Only the "Wounded Knee" cases addressed the issue of whether the performance of maintenance on loaned military equipment by military personnel violated the Posse Comitatus Act. The cases are predictable with Banks and Jaramillo finding fault with military participation. Red Feather and McArthur did not believe military maintenance was the type of direct assistance which violated the Act.[81] It is submitted that maintaining military equipment is not the type of activity which coerces or threatens to coerce

civilians. Maintenance is not the type of activity which causes citizens to be presently or prospectively subjected to regulations, proscriptions or compulsions imposed by military authority.

It may be argued that the presence of military personnel while maintaining equipment provides the capability to regulate, proscribe and compel civilians. But, so does the presence of military personnel providing the equipment in the first place. And, all authorities seem to agree that the military may provide equipment. Assume the Army provides the FBI with a helicopter and it crashes. It seems clear that the Army may provide a well-maintained replacement for the destroyed helicopter. Now assume a loaned helicopter loses one of its skids. Again, it seems clear that the Army may replace the defective helicopter with a well-maintained one. These replacements which are being loaned to the FBI are being maintained by Army personnel. But the argument goes that if military personnel replace the skid on the limping helicopter, such activity violates the Posse Comitatus Act. A distinction which says a replacement may be provided for a helicopter in need of repair, but the helicopter may not be repaired, is without merit. It is submitted that there is no real distinction between loaning equipment and maintaining it.[82]

If maintenance of equipment does not violate the Posse Comitatus Act, then the nonpreemption language in

Section 378 continues that status. Unfortunately, Department of Defense Directive 5525.5 now requires all the prerequisites set out in Section 374 be met before maintenance personnel may be provided.

EMERGENCY CIRCUMSTANCES

Without emergency circumstances, military personnel operating the provided equipment were limited to"monitoring and communicating the movement of air and sea traffic."[83] At the time of enactment, Congress was certain that there may be times when there would be a need for the military to do more. So they provided an emergency exception. The statute sets out that an emergency circumstance only exists when "the size or scope of the suspected criminal activity in a given situation poses a serious threat to the interests of the United States;"[84] and Federal drug, custom or immigration law enforcement "would be seriously impaired if the assistance described in this subsection were not provided."[85] The existence of an emergency circumstance must be determined jointly by the Secretary of Defense and the Attorney General.[86] While Congress understood that both of these agency heads have broad delegation authority, they expected and intended that the determination be made by appropriate high level officials.[87]

After examining the impressive requirements necessary for an emergency circumstance, the resultant military

participation seems extremely modest. Under an emergency circumstance the equipment operated by military personnel may be used outside the land area of the United States, its territories and possessions "as a base of operations by Federal law enforcement officials."[88] to enforce drug, customs, and immigration laws. The equipment may also "transport such law enforcement officials in connection with such operations,..."[89] However, the Act prohibits the military operated equipment from being "used to interdict or to interrupt the passage of vessels or aircraft;..."[90] The Conference Report noted that the House bill had contained authority under certain limited circumstances for military personnel to assist in arrests and seizures, but that no Federal law enforcement agency had expressed desire for that type of support.[91] However, nothing in the new Act would limit "the inherent authority of military personnel to defend themselves or to protect Federal property."[92]

NAVY AND MARINE CORPS EXCEPTION

As noted above, the additional assistance which may be provided under an emergency circumstance, is not going to be of great assistance to civilian law enforcement personnel. The authority to use a Navy vessel as a base of operation and to transport officials, while, at the same time, prohibiting the vessel from interdicting or

interrupting the passage of the smuggling vessel exceedingly frustrates the operation.

With this in mind, the Department of Defense developed an innovative approach so that the Navy and Marine Corps may interdict, search, seize and arrest.[93] Keep in mind that the Navy and Marine Corps are not included in the Posse Comitatus Act. Only as a matter of policy has the law been applied to these military services.[94] Section 375[95] of the new Act directs the Secretary of Defense to issue regulations to insure that military assistance provided does not interdict a vessel, search, seize or arrest. However, that Section only applies to activities authorized under the new Act and only if such activity was not otherwise authorized by law. As the authority of the Navy and Marine Corps does not come from the new Act, restraints applicable only to the new Act do not affect them. This position is reinforced by Section 378,[96] which emphasizes that nothing in the new Act was intended to limit executive authority in existance before its enactment.

The Department of Defense Directive requires the prior approval of the Secretary of Defense before the Navy or Marine Corps may participate in

> interdiction of a vessel or aircraft, a search or seizure, an arrest or other activity that is likely to subject civilians to the exercise of military power that is regulatory, proscriptive or compulsory in nature.[97]

It seems strange to see the above language in a DOD Directive implementing the new Act. The test to be applied for use of the Navy and Marine Corps is the same as must be found for an emergency circumstance under the new Act.[98]

CHAPTER VI

AREAS NOT COVERED BY THE NEW ACT

As mentioned earlier, Congress passed the new Act with the intent to provide additional military assistance to certain Federal agencies and to provide clarification as to the types of assistance which could be provided. There were, however, certain areas concerning military assistance to civilians authorities which were not addressed. It seems appropriate to address these areas in light of recent case law and the intent of Congress in passing the new Act.

UNDERCOVER AGENTS

Does a military undercover agent subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature? If at sometime the agent arrests, or searches, or performs any of those traditional functions of authority, the answer is easy. But even in those cases where the agent does nothing more than make a purchase from a civilian suspect, there may be a violation of the Posse Comitatus Act.[99] The military has stated that unless it is otherwise authorized military personnel will not be used as informants or undercover agents.[100] So when is it otherwise authorized?

Actions of the military are legitimate when their primary purpose is that of furthering a military function of the United States, "regardless of the incidental benefits to civilian authorities."[101] This has long been accepted as the "military purpose doctrine."[102] The issue then becomes whether the primary purpose of the undercover agent is the furthering of some military purpose. An examination of the cases in the area will provide a starting point.

It was not until the courts seriously addressed the exclusionary rule that civilian law enforcement officers became concerned about their working relationship with the military side. In United States v. Walden,[103] the United States Court of Appeals for the Fourth Circuit sent out the warning. William and Ruby Walden were illegally selling firearms to ineligible purchasers in violation of Federal law.[104] An ineligible purchaser(underage) would bring along a third party who would sign the necessary documents. The Waldens would then prepare a transfer receipt to the ineligible purchaser. Special investigators for the United States Treasury Department utilized Marines to make the unlawful purchases. The defendants, at trial, attempted to suppress the testimony of the Marines, claiming that the Marines violated military regulations and the Posse Comitatus Act. They were unsuccessful and convicted. On appeal, the United States Court of Appeals held that the Marine Corps undercover agents had violated Navy

regulations, which as a matter of policy applied the Posse Comitatus Act to the Navy and Marine Corps.[105] The court believed that the actions of the undercover agents violated the spirit of the Act, but the court was not willing to apply the exclusionary rule. The court was impressed that the Government agents had acted innocently. "/T/here is totally lacking any evidence that there was a conscious, deliberate or willful intent on the part of the Marines or the Treasury Department's Special Investigators to violate the Instruction or the spirit of the Posse Comitatus Act."[106]

The Court upheld the conviction because of the lack of bad faith and the vagueness of prior law. The Court's position that it was not necessary <u>at this time</u> to apply the exclusionary rule sent up the warning flag. If the court considered the Government's argument that the activities of the Marines were related to the maintenance, order and security of the base, it rejected it.[107] However, the sale of the weapons occurred immediately off the base in the town of Quantico. If the base authorities were aware of this fact and that the illegally sold weapons were being purchased by Marines and being brought on the base, then what may they do to insure order and discipline? Clearly they can notify local authorities. But would the purchase in question by an undercover Marine be for the primary purpose of furthering a military function? Order, discipline and security of a base is a military function.

In United States v. Wolffs,[108] a soldier had been acting as an informant for the local police. He was to attempt to purchase drugs from Wolffs. The soldier was also keeping a military Criminal Investigation Detachment (CID) Agent informed as to his activities. The CID agent became the undercover buyer for the first off-post transaction. Two CID agents were undercover buyers for the second sale and they actually made the arrest. The United States Court of Appeals for the Fifth Circuit acknowledged that the Posse Comitatus issue was difficult and complex, but they decided that it need not be answered. They held that even assuming a violation of the Act, application of the exclusionary rule was not warranted. Following Walden, they concluded that if they are "confronted in the future with widespread and repeated violations of the Posse Comitatus Act, an exclusionary rule can be fashioned at that time."[109]

Four cases have come out of the Lawton-Fort Sill, Oklahoma area. The first three were decided in 1972-73. In Hubert v. State,[110] members of the Fort Sill CID apprehended a soldier for drug offenses. The soldier took the CID to the off-post quarters of his supplier. The CID purchased marijuana and turned it over to the Lawton police. The Lawton police using the CID agents set up a controlled buy. After this second buy, the contraband was turned over to the Lawton police who arrested the

accused. Hildebrandt v. State,[111] and Lee v. State[112] were similar, but unrelated cases. In all three cases the defendants argued that the testimony of the CID agents was incompetent because of the Posse Comitatus Act. All three convictions were upheld. The court was satisfied that the CID had a right to investigate soldiers involved with drugs and to determine their source of supply. In the Hubert case, the soldier led the CID to a "location outside the scope of their military jurisdiction at which time the agents assumed no greater authority than that of a private citizen."[113]

While there is validity in the "private citizen" argument, it loses much of its credibility when the individuals are military police performing their trained profession. Further, it is difficult to determine what authority any citizen would have to make the first uncontrolled purchase in the Hubert case. If they were not acting under some official authority, then the unauthorized purchase from Hubert would seem to be a criminal act. A more persuasive argument is that the CID agents were performing an official military function of ascertaining the source of drug traffic coming on to Fort Sill. The method used was to insure a high degree of certainty. As long as they sanitize their actions, not asserting authority over civilians, then most courts appear satisfied.

The most recent Oklahoma case did not meet the above test. In Taylor v. State,[114] Mainard, an agent of the Fort Sill drug suppression team was led to an off-post drug source by two soldiers under investigation. After coordinating with the Lawton police, Mainard was provided with money and wired with a radio transmitter. Immediately after the sale, the local police arrested the defendant. However, Mainard also participated in the arrest. He pulled his weapon during the arrest and actively assisted in the search of the defendant's house. He also personally delivered the drugs to the Oklahoma State Bureau of Investigation. The court stated they would not apply the exclusionary rule to the Posse Comitatus Act. They were unwilling to give the act such elevated treatment. However, they did feel compelled to examine illegal conduct by law enforcement personnel to see if it "rises to an intolerable level as to necessitate the exclusion of the evidence resulting from the tainted arrest."[115] The court concluded that Mainard's actions were at that intolerable level. It is interesting to note that had Mainard stepped back at the time of the arrest and not participated, the court would have upheld the conviction.

If the person under investigation is a military member, it would seem that the military would have sufficient interest in the case so that there would be no problem. But in 1969, the Supreme Court decided O'Callahan v.

Parker,[116] which greatly limited court-martial jurisdiction. Unless the crime was in some way "service connected" there was no military jurisdiction.[117] The wake of that decision left military investigators confused and perplexed as to the limits of their authority. Finally, in 1980, the Court of Military Appeals expanded court-martial jurisdiction to include almost every involvement of service personnel with commerce in drugs.[118] This gave more legitimacy to military police investigations off the installation. While the Trottier decision only applied to drug offenses, it should be kept in mind that the military has administrative authority to take action concerning many off-post incidents not involving drugs. So the authority of the military police investigator goes beyond the boundaries of the installation. In state criminal prosecutions where the defendants were members of the military the courts had little difficulty in disposing of Posse Comitatus Act complaints.[119]

People v. Burden[120] is an excellent example where an airman is treated as any other citizen for purposes of the Posse Comitatus Act. Airman Hall, in the presence of Air Force special agents, was confronted by Michigan State Police with criminal charges involving drug activity. The state police advised Hall that if he would cooperate as an undercover agent charges would be dropped. The Air Force would also give him special consideration and reassign

him. Hall agreed and went off-base to the trailer of Burden where he purchased LSD and PCP. The trial court suppressed the evidence obtained through Hall because of his military status. The Michigan Court of Appeals affirmed the trial court decision.[121] The Court of Appeals rejected the language in McArthur stating that the Posse Comitatus Act doesn't require that the military subject civilians to regulations, proscriptions or compulsions. "Although it is clear that the subjugation of civilians to military power would violate the act, so does use of military personnel as undercover agents for civilian authority."[122] The Court of Appeals felt compelled to apply the exclusionary rule because its investigation had failed to uncover a prosecution under the Posse Comitatus Act. "Thus the only real sanction remaining to dissuade persons who violated its provisions is the sanction of the exclusionary rule."[123]

The Supreme Court of Michigan reversed in favor of the prosecution. The court relied heavily on the lower court's dissenting opinion of Presiding Judge Walsh. The court concluded that the legislative history of the Act clearly understood that there would be times when a soldier would be no more than any other citizen and should be treated so under the Act. During the Legislative debate Senator Windom asked Senator Merriman if a soldier could assist Merriman if he were being murderously attacked.

> If a soldier sees a man assaulting me with a view to take my life, he is not

> going to stand by and see him do it, he comes to my relief not as a soldier, but as a human being, a man with a soul in his body, and as a citizen.... The soldier standing by would have interposed if he had been a man, but not as a soldier. He could not have gone down in pursuance of an order from a colonel or a captain, but he would have done it as a man.[124]

In citing Judge Walsh the court concluded this was an excellent example of the military member who is to be treated as any other citizen.

> In cooperating and assisting the civilian police agency, Hall was not acting as a member of the military. He was acting only as a civilian. His military status was merely incidental to and not essential to his involvement with the civilian authorities. He was not in uniform. He was not acting under military orders. He did not exercise either explicity or implicity any military authority.[125]

While Burden's analysis of the airman as a citizen seems quite correct, it will not be much help to the military policeman who is a full time crime fighter. His military status is not just incidental to his off-post undercover work. Further, his actions are authorized by his military superiors. As stated earlier, he should insure he is pursuing a legitimate military function. If his action takes him off-post, he should be as unobtrusive as possible. He should never be in a position to assert authority over civilians. The locating of civilians who are pushing drugs on the installation clearly has an effect upon law, order, discipline, morale and security.

JOINT MILITARY-CIVILIAN PATROLS

Many military installations are located next to towns with a smaller population than the installation. These small towns increase in population on weekends, when the troops are looking for entertainment. The police force of these towns is usually larger than their sister towns of equal size. Even then, their police force may be undermanned for the weekend activities. One solution to the problem is for the military police to assist. While military police authority is limited to military personnel who violate military law, that includes reckless and drunken driving, disorderly conduct and other types of conduct prejudice to the good order and discipline of the Armed Forces. It is not unusual to see a military police patrol cruising the entertainment district of a neighboring town.

The joint military-civilian patrol is another possible solution. As early as 1922, the Army Judge Advocate General frowned on such activity believing they would undoubtedly result in confusion and harmful results if practiced.[126] In 1952, The Judge Advocate General determined that the purpose of the ride along was to allow "military personnel to assist civilian police in enforcing the laws,"[127] thus violating the Posse Comitatus Act. However, in 1956, in a lengthy and well-developed opinion, The Judge Advocate General advised the Provost Marshal General that earlier

opinions were "unduly pessimistic and restrictive."[128] He advised that earlier opinions were not based upon legal principle, but based upon policy. Thus, joint patrols were permitted with the understanding that military police would be thoroughly instructed as to the limits of their authority.

In 1976, the Kansas Supreme Court addressed the legality of a joint patrol between the Junction City police and the Fort Riley military police.[129] In that case a joint patrol received notice of a liquor store robbery. They stopped a car fitting the description of the robbery vehicle and both officers assisted in a consent search of the car. The military policeman found a pistol under the passenger seat. The trial judge suppressed all evidence concerning the arrest because of the Posse Comitatus Act. On appeal, the Supreme Court of Kansas reversed. The court concluded that the activities of the MP constituted a technical violation of the Act. But the court gave weight to the fact that the MP was acting innocently (with no knowledge of the Act), and that no court at that time had ever applied the exclusionary rule to the Act. They found the reasoning in the Walden case persuasive.

Can the joint patrol work? If there is to be a joint patrol, both members must be thoroughly versed in what is legally permissible. But even so the problems of the joint patrol are overwhelming. For example, if the civilian

police officer apprehends a civilian offender, the military policeman should not participate in the arrest. Is the military policeman's presence at the scene, with his helmet, brassard and weapon some type of assistance? Is this a case of the civilian being subjugated to military authority? Presence creates the appearance of assistance. If a thug accompanied by two individuals stops a citizen and demands his wallet, the presence of the two individuals standing by may affect the citizen's decision. These two individuals also may have some difficulty in convincing a court that they were not involved. So presence and appearance of authority may affect activities. Further, the possibility that the civilian police officer may be in dire need of assistance is forseeable. Thus, it is hard to accept the theory that the military policeman is merely like any other citizen under such circumstances. The MP is a trained law enforcer who has been assigned by military orders to accompany the civilian policeman. No one would expect him to walk away from a life threatening situation. But no set of instructions can solve these Posse Comitatus problems.

CHAPTER VII

REIMBURSEMENTS

> Section 377. Reimbursement. The Secretary of Defense shall issue regulations providing that reimbursement may be a condition of assistance to a civilian law enforcement official under the chapter.[130]

Whether the Department of Defense will be reimbursed is a major controversy. The cost of the assistance can be enormous. Shortly after the enactment of the new Act, the United States Customs Service implemented Operation Thunderbolt. During the operation, they used Navy E2-C aircraft with sophisticated radar equipment, capable of detecting low flying aircraft. The cost of using the E2-Cs for 72 days was $800,000.[131]

The Secretary of Defense issued his regulation in Enclosure 5 to DOD Directive 5525.5. The guidance advised that in most cases when equipment or services are provided, the Economy Act[132] requires Department of Defense reimbursement.[133]

The Directive sets out three situations when a waiver of reimbursement may be granted: (1) when the assistance provided is incidental to the military purpose of the mission; (2) when the DOD personnel involved receive training and operational benefits equivalent to the benefits provided; or, (3) "when reimbursement is not otherwise required by law" and waiver will not adversely affect military preparedness.[134]

The Department of Justice did not agree with Defense as to when reimbursement was mandatory. In a 9 August 1982 letter to the Secretary of Defense, the Attorney General advised that reimbursement under Section 377 was discretionary with the Secretary of Defense and that he was looking forward to department cooperation "on a non-reimbursable basis in staunching the flow of illegal drugs across our borders."[135] An opinion of the Office of Legal Counsel of the Justice Department was attached to the Attorney General's letter.[136] The opinion argued that the use of the word "may" in Section 377 clearly made the question of reimbursement permissible and not mandatory. The opinion agreed that under the Economy Act agencies providing services were generally required to seek reimbursement for the actual cost of the services provided. However, the Department of Defense Authorization Act, 1982 (new Act), provided separate and specific authority for one agency to assist another, and thus, there was no need to rely or apply the Economy Act to such cases.[137] In the new Act, Congress provided specific authority and made reimbursement permissible. The Justice opinion began to labor when it cited the definition of "may" from the Webster Dictionary.

The opinion stated that strong Congressional support for the Defense position that it should not have to provide services out of military funds is distinguishable from the position that reimbursement is mandatory.

Concerning Section 377, the Conference Committee stated the "regulation should reflect sufficient flexibility to take into consideration the budgetary resources available to civilian law enforcement agencies."[138] The Office of Legal Counsel insisted that the Conference Committee would not be addressing "sufficient flexibility" if reimbursement were mandatory.[139]

The Defense Department had made its position known to the Justice Department as early as March, 1982. Its views were considered and rejected in the Office of Legal Counsel Opinion. Certain points in the Defense Department position are difficult to ignore. First, Section 372 of the new Act states that the Secretary of Defense, "in accordance with other applicable law," may make equipment available (emphasis added).

> This phrase was added to the legislation by the House Judiciary Committee, with the support of the Government Operations Committee, to ensure that the clarification of the Posse Comitatus Act, 18 U.S.C. 1385, did not produce any changes in law governing the transfer of property and services among government agencies. [140]

The Conference Committee stated that "in accordance with other applicable law" was added to assure the continued application of existing law.[141] This seems inconsistent with Justices position that a new and specific authority apart from the Economy Act had been created.

The Defense Department also has a persuasive explanation as to why the permissive word "may" was used in Section 377. Had the section stated "reimbursement shall be a condition," then the Secretary of Defense would be required to collect, even in cases where the service provided was incidental to the military function.[142]

It is no coincidence that the opinions of both agencies strongly support the interests of their particular agency. This is advocacy at its finest. However, in a bureacracy, the agency with the best connections will undoubtedly be determined to be correct.

CHAPTER VIII

SUMMARY AND CONCLUSION

In its effort to encourage the military to provide assistance to civilian law enforcement officials, Congress provided clarification and slight modification to the Posse Comitatus Act. The first three sections of the new Act were intended to clarify existing law. Commanders who were hesitant to respond prior to the new Act, no longer had reason to pause.

The new Act authorized the providing of criminal information obtained during the normal course of military operations; the providing of military equipment and facilities for law enforcement purposes; the providing of military personnel to train civilian law enforcement personnel in the operation and maintenance of equipment provided under the new Act; and the providing of expert advice. The authority of the military to act in these areas is probably wider than that spelled out in the legislation. But because of the nonpreemption provision in the new Act, wider authority, such as training law enforcement personnel in crowd and riot control, still exists.

For the first time since the enactment of the Posse Comitatus Act, military personnel are now authorized to operate military equipment to assist civilian law enforce-

ment. However, except in emergency circumstances, the military personnel may only use the equipment for "monitoring and communicating the movement of air and sea traffic."[143] The test for meeting the requirements of an emergency circumstance are difficult and the increase in assistance provided by the military is meager. Only by using the Navy and Marine Corps, who have never been covered by the Posse Comitatus Act, has the Defense Department developed a procedure for providing aggressive assistance.[144] The procedure which permits the Navy and Marine Corps to interdict vessels, arrest, search and seize will surely be challenged in the future.

Much of the day to day interface between the military policemen and the local civilian authorities was not addressed in the new Act. The issue of the military undercover agent and how deeply he may become involved in off-post activities remains ripe for litigation. The military policeman who can document that his off-post activities are official military functions related to protecting discipline, morale, safety, and security of the installation will be in the best position to succeed in litigation. He must also insure that his activities do not constitute an exercise of authority over civilians.

The Department of Defense cannot afford to pay the costs of the assistance provided under the new Act. How-

ever, pressure can be applied by Congress and the Administration to cause that result. It is difficult to make the call as to when the expense has reached the point that it will affect military preparedness. Hopefully the Defense Department will prevail in its views on reimbursement under the Economy Act.[145] This would require Congress to appropriately fund the requesting law enforcement agencies.

Probably the most significant aspect of the new Act, is that it seems to have adopted the active/passive philosophy of Red Feather[146] and McArthur[147] in developing limits on military assistance. This adds credence to those cases which should result in a more logical development of the law in this area.

FOOTNOTES

CHAPTER I

1. The letter is similiar to many forwarded to the Pentagon for an appropriate response.

2. Comments by Congressman Charles E. Bennett, on 26 February 1983, during a hearing of the Government Information, Justice and Agriculture Subcommittee of the Committee on Government Operations.

3. A tremendous amount of correspondence from constituents is forwarded to Federal agencies for direct reply, with an information copy provided to the congressman. Draft letters are also prepared for the congressman's signature. The Office of the Chief, Legislative Liaison, Department of the Army, acts as the point of contact for Army assistance.

4. 18 U.S.C. §1385 (1976).

5. Id.

6. 10 U.S.C.A. §§371-378 (West Supp. 1981).

CHAPTER II

7. Act of June 18, 1878, §15, 20 Stat. 152 (codified in 18 U.S.C. §1385).

8. See Furman, Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act, 7 Mil. L. Rev. 85, 92-96 (1960) [hereinafter cited as Furman].

9. See Furman, supra, at 95-97; Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act, 70 Mil. L. Rev. 83, 86-92 (1975) [hereinafter cited as Meeks].

10. Chandler v. United States, 171 F. 2d 921, 936 (1st Cir. 1948).

11. 16 Op. Atty. Gen. 162 (1878).

12. Department of Defense activities are not permitted to provide assistance which selectively benefits a particular organization. Religious organizations are specifically mentioned. Department of Defense Directive 5410.18, para V.B.2. (3 July 1974). DOD activities are also prohibited from providing services when such service would compete with local civilian commercial activities. DOD Dir. 5410.18, para V.B.10. (3 July 1974).

13. United States v. Walden, 490 F. 2d 372 (4th Cir), cert. denied, 416 U.S. 983 (1974).

14. Id. at 373 and 377.

15. United States v. Banks, 383 F. Supp. 368 (D.S.D. 1974), and United States v. Jaramillo, 380 F. Supp. 1375 (D. Neb. 1974), appeal dismissed, 510 F. 2d 808 (8th Cir. 1975).

16. These cases will be examined subsequently, but treating loans of property and advice of observers as possible violations shows the depth of the problem.

17. H. R. REP. NO. 97-71, Part 2, 97th Cong., 1st Sess., reprinted in /1981/ U. S. CODE CONG. and AD. NEWS 1785 /hereinafter cited as H.R. REP. NO. 97-71/.

18. Id. at 3.

19. Id.

CHAPTER III

20. 10 U.S.C.A. §§371-378 (West Supp. 1981).

CHAPTER IV

21. H. R. REP. NO. 97-71, supra note 17, at 8-10.

22. 10 U.S.C.A. §371 (West Supp. 1981) states:

> The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local civilian law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

23. This issue was never in doubt.

24. The author was the Staff Judge Advocate, 1st Infantry Division (Mech) and Fort Riley, at the time of the incident.

25. Of course, the incident occurred on the installation. When the incident occurs off post, the military must be able to satisfy the court that they were performing official military duties.

26. The military police would argue that all dealers in the chain are affecting morale and discipline on the post and that they should be able to follow their lead as far as it takes them.

27. H. R. REP. NO. 97-71, supra note 17, at 8.

28. Department of Defense Directive 5525.5, Encl. 2, para A.5. (22 March 1982) [hereinafter cited as DOD Dir. 5525.5].

29. Id. At the time of this submission, the military secretaries had not yet submitted guidance.

30. 200 F. Supp. 457 (E.D.N.Y. 1961).

31. 28 U.S.C. §2674 (1976).

32. 200 F. Supp. at 465.

33. 383 F. Supp. 368 (D.S.D. 1974).

34. Id. at 376.

35. The Posse Comitatus Act only applies to the National Guard when performing Federal service. DAJA-AL 1980/2685, 16 Sep 1980. See Furman, supra note 8, at 101.

36. In Meeks, supra, note 9, the author states that interviews with members of the National Guard Bureau, who requested anonymity, indicated that the Nebraska personnel had been ordered to Federal service.

37. 380 F. Supp. 1375 (D. Neb. 1974), appeal dismissed, 510 F. 2d 808 (8th Cir. 1975).

38. Id. at 1380.

39. Id. at 1381.

40. 200 F. Supp. 457 (E.D.N.Y. 1961).

41. 392 F. Supp. 916 (D.S.D. 1975), aff'd sub nom. United States v. Casper, 541 F. 2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

42. Id. at 922.

43. Department of Defense Directive 5200.27 (7 Jan 1980); and Army Regulation 380-13 (30 Sep 1974).

44. DOD Dir. 5200.27, para F.1. (7 Jan 1980).

45. AR 380-13, para 10a (30 Sep 1974).

46. H. R. REP. NO. 97-71, supra note 17, at 8.

47. 5 U.S.C. §552a (1976).

48. 5 U.S.C. §552a(a)(7) and (b)(3)(1976).

49. Army Regulation 340-21, para 3-1c(1) (27 August 1975; change 2, 15 June 1979).

50. See Furman, supra note 8, at 123; JAGA 1968/3586, 26 March 1968.

51. 383 F. Supp. 368 (D.S.D. 1974).

52. Id. at 375.

53. Id.

54. Id. at 376.

55. During the Hanafi Muslem hostage situation in Washington, D.C., the Justice Department requested grenades in case the gunmen began to kill their hostages. There was a delay in responding to the request.

56. Memorandum for the Attorney General, dated 17 March 1977, subject: Loan of Military Equipment for Local Law Enforcement Purposes During Emergencies.

57. 10 U.S.C.A. §372 (West Supp. 1981) states:

> The Secretary of Defense may, in accordance with other applicable law, make available any equipment, base facility, or research facility of the Army, Navy, Air Force, or Marine Corps to any

Federal, State, or local civilian law enforcement official for law enforcement purposes.

58. 10 U.S.C.A. §376 (West Supp. 1981) states:

> Assistance (including the provision of any equipment or facility or the assignment of any personnel) may not be provided to any civilian law enforcement official under this chapter if the provision of such assistance will adversely affect the military preparedness of the United States. The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any such assistance does not adversely affect the military preparedness of the United States.

59. See DOD Dir. 5525.5, paras E.1.f., E.2.c.(3), E.5.a.; Encl. 2, para B; Encl. 3, para C; Encl. 4, para D; and Encl. 5, para C.

60. DOD Dir. 5525.5, Encl. 3, para D.3.c.

61. DOD Dir. 5525.5, Encl. 3, para D.3.d.

62. HQDA MSG DTG 251745Z Apr 83, Subject: Cooperation with Civilian Law Enforcement Officials (DAMO-ODS).

63. 10 U.S.C.A. §373 (West Supp. 1981).

64. H. R. REP. NO. 97-71, supra note 17, at 10.

65. See Meeks, supra note 9, at fn. 204.

66. 10 U.S.C.A. §378 (West Supp. 1981).

67. DOD Dir. 5525.5, Encl. 4, para A.4.

68. Department of Defense Directive 3025.12, para X.C. (19 August 1971).

69. H. R. REP. NO. 97-71, supra note 17, at 10, fn. 2.

70. United States v. Banks, supra note 15; and United States v. Jaramillo, supra note 15.

71. It is difficult to state exactly what the courts found as neither was willing to find that Colonel Warner or any other Federal official had violated the Posse

Comitatus Act. They did not believe they had to go that far to dispose of the case and so they did not.

72. 392 F. Supp. 916 (D.S.D. 1975), aff'd sub nom. United States v. Casper, 541 F. 2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970 (1977).

73. 419 F. Supp. 186 (D.N.D. 1976).

74. Id. at 194.

75. The results in McArthur are sound, but the statement about borrowing expert advice is somewhat troublesome. Why not borrow undercover agents or investigators?

76. 10 U.S.C.A. §375 (West Supp. 1981) states:

> The Secretary of Defense shall issue such regulations as may be necessary to insure that the provision of any assistance (including the provision of any equipment or facility or the assignment of any personnel) to any civilian law enforcement official under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in an interdiction of a vessel or aircraft, a search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

CHAPTER V

77. 10 U.S.C.A. §374 (West Supp. 1981) states:

> (a) Subject to subsection (b), the Secretary of Defense, upon request from the head of an agency with jurisdiction to enforce--
>
> (1) the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);
>
> (2) any of sections 274 through 278 of the Immigration and Nationality Act (8 U.S.C. 1324-1328); or

(3) a law relating to the arrival or departure of merchandise (as defined in section 401 of the Tariff Act of 1930 (19 U.S.C. 1401)) into or out of the customs territory of the United States (as defined in general headnote 2 of the Tariff Schedules of the United States (19 U.S.C. 1202)) or any other territory or possession of the United States,

may assign personnel of the Department of Defense to operate and maintain or assist in operating and maintaining equipment made available under section 372 of this title with respect to any criminal violation of any such provision of law.

(b) Except as provided in subsection (c), equipment made available under section 372 of this title may be operated by or with the assistance of personnel assigned under subsection (a) only to the extent the equipment is used for monitoring and communicating the movement of air and sea traffic.

(c)(1) In an emergency circumstance, equipment operated by or with the assistance of personnel assigned under subsection (a) may be used outside the land area of the United States (or any territory or possession of the United States) as a base of operations by Federal law enforcement officials to facilitate the enforcement of a law listed in subjection (a) and to transport such law enforcement officials in connection with such operations, if--

(A) equipment operated by or with the assistance of personnel assigned under subsection (a) is not used to interdict or to interrupt the passage of vessels or aircraft; and

(B) the Secretary of Defense and the Attorney General jointly determine that an emergency circumstance exists.

(2) For purposes of this subsection, an emergency circumstance may be determined to exist only when--

(A) the size or scope of the suspected criminal activity in a given situation poses a serious threat to the interests of the United States; and

(B) enforcement of a law listed in subsection (a) would be seriously impaired if the assistance described in this subsection were not provided.

78. 10 U.S.C.A. §374(b) (West Supp. 1981).

79. H. R. REP. NO. 97-311, 97th Cong., 1st Sess., reprinted in [1981] U. S. CODE CONG. and AD. NEWS 1860, 1861 [hereinafter cited as H.R. REP. NO. 97-311].

80. DOD Dir. 5525.5, Encl. 4, para A.6.b.

81. None of the courts addressed whether a national guardsman in state status was subject to the Posse Comitatus Act. While it is irrelevant to the main issue, these cases could have been disposed of on the National Guard issue. National guardsmen in state status are not subject to the Act. See Furman, supra note 8, at 101; DAJA-AL 1980/2685, 15 September 1980.

82. In JAGA 1968/3586, 26 March 1968, the Judge Advocate General advised that there was no legal objection to loaning unarmed helicopters to a National Guard unit for civil disturbance operations, but that pilots and maintenance personnel may not be provided. JAGA 1957/1209, 18 January 1957, was cited as authority for that opinion, but JAGA 1957/1209 dealt only with pilots.

83. 10 U.S.C.A. §374(b) (West Supp. 1981).

84. 10 U.S.C.A. §374(c)(2)(A) (West Supp. 1981).

85. 10 U.S.C.A. §374(c)(2)(B) (West Supp. 1981).

86. 10 U.S.C.A. §374(c)(1)(B) (West Supp. 1981).

87. H.R. REP. NO. 97-311, supra note 74, at 121.

88. 10 U.S.C.A. §374(c)(1) (West Supp. 1981).

89. Id.

90. 10 U.S.C.A. §374(c)(1)(A) (West Supp. 1981).

91. H.R. REP. NO. 97-311, supra note 74, at 121.

92. Id.

93. DOD Dir. 5525.5, Encl 4, para C.2.

94. SECNAVINST 5820.7 (15 May 1974).

95. See note 76 supra.

96. See text accompanying note 66 supra.

97. DOD Dir. 5525.5, Encl. 4, para C.2. This language should sound familiar, because it was used in United States v. McArthur, 419 F. Supp. 186 (D.N.D. 1976) to describe the type of conduct which violates the Posse Comitatus Act.

98. DOD Dir. 5525.5, Encl. 4, para C.2. "Such approval may be granted only when the head of a civilian agency concerned verifies that: a. The size or scope of the suspected criminal activity poses a serious threat to the interests of the United States, and the enforcement of the law within the jurisdiction of the civilian agency would be seriously impaired if the assistance were not provided because civilian assets are not available to perform the mission; or b. Civilian law enforcement assets are not available to perform the mission and temporary assistance is required on an emergency basis to prevent loss of life or wanton distruction of property."

CHAPTER VI

99. Even in a case where the Army was merely requested to store explosive devices until trial, it was decided that such action would violate the Posse Comitatus Act. Army custodians would be required to testify at trial to prove chain of custody. JAGA 1970/3513, 18 February 1970.

100. DOD Dir. 5525.5, Encl. 4, para A.3.d.

101. DOD Dir. 5525.5, Encl. 4, para A.2.a.

102. See Furman, supra note 8, at 112-126; Meeks, supra note 9, at 124-126. In JAGA 1956/8555, 26 November 1956, The Judge Advocate General stated, "The phrase 'to execute the law' would seem to import an active use of the Army for that purpose and would not appear to include incidental assistance to civilian law enforcement agencies which may result from an otherwise authorized use of the Army."

103. 490 F. 2d 372 (4th Cir), cert. denied, 416 U. S. 983 (1974).

104. 18 U.S.C. §§922(b)(1), 922 (b)(3) and 924(a) (1970).

105. SECNAVINST 5400.12 (17 January 1969).

106. 490 F. 2d at 376.

107. See Meeks, supra note 9, at note 176 and accompanying text.

108. 594 F. 2d 77 (5th Cir. 1979).

109. Id. at 85.

110. 504 P. 2d 1245 (Okla. Crim. App. 1972).

111. 507 P. 2d 1323 (Okla. Crim. App. 1973).

112. 513 P. 2d 125 (Okla. Crim. App. 1973).

113. 504 P. 2d at 1247.

114. 645 P. 2d 522 (Okla. Crim. App. 1982).

115. Id. at 524.

116. 395 U. S. 258 (1969).

117. Rice, O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman, 51 Mil. L. Rev. 41 (1971).

118. United States v. Trottier, 9 M. J. 337 (C.M.A. 1980).

119. Burns v. State, 473 S.W. 2d 19 (Tex. Crim. App. 1971); State v. Trueblood, 265 S.E. 2d 662 (N.C. App. 1980).

120. 411 Mich. 56, 303 N.W. 2d 444 (1981).

121. People v. Burden, 94 Mich. App. 209, 288 N.W. 2d 392 (1979).

122. Id. at 394.

123. Id. at 395.

124. 7 CONGR. REC. 4245 (1878).

125. 303 N.W. 2d at 446-7.

126. JAG 253.5, 14 June 1922.

127. JAGA 1952/4810, 26 May 1952.

128. JAGA 1956/8555, 26 November 1956.

129. State v. Danko, 219 Kan. 490, 548 P. 2d 819 (1976).

CHAPTER VII

130. 10 U.S.C.A. §377 (West Supp. 1981).

131. Testimony of Mr. James Julian, Principal Deputy Assistant Secretary of Defense, Manpower, Reserve Affairs, and Logistics, Department of Defense at the hearings before Government Information and Individual Rights Subcommittee of the Committee on Government Operations on 22 February 1982.

132. 31 U.S.C. §686 (1976).

133. DOD Dir. 5525.5, Encl. 5, para B.1.

134. DOD Dir. 5525.5, Encl. 5, para B.2.

135. William French Smith, Attorney General, letter to Caspar Weinberger, Secretary of Defense, 9 August 1982.

136. Memorandum for The Attorney General, subject: Reimbursement for Defense Department Assistance to Civilian Law Enforcement Officials, from Theodore B. Olson, Office of Legal Counsel, Department of Justice, 24 July 1982 [hereinafter cited as memo for A.G.]

137. Id. at 6.

138. H. R. REP. NO. 97-311, supra note 74, at 122.

139. Memo for A.G., supra note 136, at 13.

140. William H. Taft IV, General Counsel, Department of Defense, letter to Theodore B. Olson, Office of Legal Counsel, Department of Justice, 11 June 1982 [hereinafter cited as Taft letter].

141. H. R. REP. NO. 97-311, supra note 74, at 119.

142. Taft letter, supra note 140, at 2.

CHAPTER VIII

143. 10 U.S.C.A. §374(b) (West Supp. 1981).

144. DOD Dir. 5525.5, Encl. 4, para C.2.

145. 31 U.S.C. §686 (1976).

146. 392 F. Supp. 916 (D.S.D. 1975) aff'd sub nom. United States v. Casper, 541 F. 2d 1275 (8th Cir. 1976) cert. denied 430 U. S. 970 (1977).

147. 419 F. Supp. 186 (D.N.D. 1976).

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5 U.S.C. §552a (1976).
10 U.S.C.A. §§371-378 (West. Supp. 1981).
18 U.S.C. §922 (1976).
18 U.S.C. §924 (1976).
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28 U.S.C. §2674 (1976).
31 U.S.C. §686 (1976).

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